

STATE OF MICHIGAN
COURT OF APPEALS

ALIKAH RAE MARTIN, a/k/a AKILAH RAE
MARTIN,

Plaintiff-Appellant,

v

CHARLES EDWARD-RUSSELL HORTON,

Defendant-Appellee.

UNPUBLISHED
May 16, 2019

No. 344875
Kalamazoo Circuit Court
LC No. 17-000463-NI

Before: GLEICHER, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Plaintiff was injured while riding as a passenger on defendant's motorcycle. The circuit court summarily dismissed plaintiff's negligence action, determining that her injuries resolved after three or four months and that she presented no evidence that defendant breached any duty of care. However, plaintiff's evidence created genuine issues of material fact regarding defendant's negligence and that she suffered an objectively manifested impairment of an important body function. We vacate and remand for further proceedings.

I. BACKGROUND

On October 24, 2014, then 14-year-old Alikah Martin went for a motorcycle ride with family friend Charles Horton. Horton did not provide a helmet for the minor. While driving 40 miles an hour and changing lanes to pass a slower vehicle, Horton's motorcycle hit an oily patch on the road. Horton lost traction and control and the motorcycle overturned. Martin was thrown from the motorcycle. Martin was taken by ambulance to Bronson Hospital and was initially diagnosed with a fractured right wrist ("[r]ight distal radial fracture, nondisplaced"), facial abrasions, and abrasions on her knee. The hospital conducted a CT scan, which uncovered a "temporal contusion consistent with exam." During testing, Martin "los[t] a point on speech for disorientation." She was "able to converse normally, but [did not] know her father's name, what school she [went] to, and other similar details." The doctor diagnosed Martin with a "mild" traumatic brain injury. The orthopedic surgeon prescribed a soft cast for her wrist. Martin spent two days in the hospital.

Martin slowly healed in the months that followed. On November 3, 2014, Martin reported amnesia “to the event . . . until waking up in the ER.” She was still “fatigue[d] but not confused” and had “clear memory impairment as well as balance difficulty.” By November 14, Martin had returned to school, which worsened the effect of her head injury. But the abrasions near her eye and on her lip had healed. On November 21, Martin reported that she had suffered from a history of migraines, “so [it was] hard to tell if it is from the concussion/occurring depending on what she is doing.” Otherwise, the doctor noted, “[s]ymptoms have cleared for the most part.” Her soft cast was removed in December.

During her deposition, Martin testified that she was a freshman at the time of her accident. She returned to sports that spring, but missed her freshman basketball season. In the spring of 2016, Martin injured herself at track practice. Martin described that since her accident, she would get “dizzy out of nowhere” and would “just fall.” At the practice, Martin became dizzy, fell, and hit her head, suffering another concussion. Martin further reported that she suffered jaw pain after the motorcycle accident, and up to the present, but that her father would not take her to the dentist. There was a scar inside her mouth from the cut to her lip and it was “sensitive” and got “irritated when [she] brush[ed] [her] teeth.” Martin began suffering shoulder pain after the accident that made lifting difficult. Martin’s knee began hurting when she used stairs and when she ran. She further noted that she began suffering migraines after the accident. She had regular headaches “[a] few times each week” but migraines less often. Before the accident, Martin only had headaches when she was sick. Martin testified that her head injury caused memory loss; she could not remember the accident. Although Martin returned to school, she claimed that she had no memory until February 2015, and she remembered nothing for the four months between. Martin testified that she was bullied following her accident until midway through the next schoolyear. Her mouth injury caused a speech impediment and other students mocked and mimicked her. Martin stated that as a result of this bullying, and the poor treatment of her biological father, she attempted suicide.

Martin filed suit against Horton once she turned 18. She contended that Horton operated the motorcycle negligently at a high rate of speed and without due care. This negligence caused Martin to “suffer[] serious impairment of her body functions and/or serious, permanent disfigurement, to wit: head, face, knee(s), right wrist, neck and back injuries.” Martin further alleged that she experienced continuing “great physical pain, mental anguish, humiliation, embarrassment, anxiety and depression.”

Following discovery, Horton sought summary disposition of Martin’s complaint pursuant to MCR 2.116(C)(10). Horton contended that Martin had not suffered a compensable serious impairment of an important body function. Horton conceded that Martin’s fractured wrist amounted to an objectively manifested impairment. However, Horton argued, “[a] ‘fat lip,’ jaw pain, swollen nose, and ‘road rash’ on a knee and face do not impair important body functions.” Horton made no mention of Martin’s neurological injury. Horton continued that even Martin’s fractured wrist did not affect her “general ability to lead her normal life.” Horton emphasized that Martin did not require surgery or stitches, only a soft cast. A defense medical examination conducted four years after the accident asserted that Martin was completely healed. Martin completed high school with a high grade point average while participating in multiple sports and taking college classes toward becoming an emergency medical technician.

Horton further asserted that Martin had not presented evidence of his negligence. Martin could not remember the accident and therefore “does not know what, if anything, Horton did wrong.” Martin therefore could not establish that Horton breached his duty of care.

Martin responded with evidence that she had suffered a fractured right wrist, a mild TBI, and multiple abrasions, resulting in lasting headaches, knee and wrist pain, clicking in her jaw, and memory problems. This evidence created a factual question regarding whether she suffered a serious impairment of an important body function, Martin asserted. That the injuries were not permanent was irrelevant, Martin contended as there is no time limit on how long a person’s general ability to lead his or her normal life must be impacted. Martin pointed to evidence that she attempted suicide as a result of the post-accident bullying she suffered. The parties also presented conflicting evidence regarding the nature of her injuries, Martin argued. Martin conceded that Horton presented evidence that some of her conditions were preexisting. This evidence was not outcome determinative, however, as a plaintiff may secure recovery for an exacerbation of conditions.

Martin further argued that she created a genuine issue of material fact regarding Horton’s negligence. Martin emphasized that Horton came forward with no evidence beyond his self-serving statements that he was driving in a reasonable and prudent manner. The issue remained a credibility contest that must be resolved by the trier of fact.

At the summary disposition hearing, Martin expanded her argument regarding the extent and nature of her injuries. She noted that her wrist was broken and casted for eight weeks. Martin had included pictures of her facial injuries in her response to the summary disposition motion. They depicted “severe facial disfigurement . . . initially after the accident,” which did heal with the exception of a small scar on Martin’s nose. Martin accused Horton of “gloss[ing] over” her knee injury and TBI. Martin conceded that “looking at her now four years later,” she had recovered well. She returned to school and “move[d] on [with her] life” because she could not “malingering forever in this.” But the threshold did not require a permanent life impact. Martin emphasized that she was bullied after the accident, leading to her suicide attempt. Although Martin had already suffered emotional trauma, the accident aggravated that condition. Martin’s injuries affected her hobbies as well. She was not able to run as easily because of her knee injury. Her broken wrist and head injury interrupted her sports participation for a time.

Regarding the evidence of Horton’s negligence, Martin argued, “I think what’s very important here is we have a 14-year-old little girl that was put by this adult man on the back of a motorcycle without a helmet. That alone is negligent. . . .” Because Martin was not wearing a helmet, the hospital contacted Child Protective Services and the emergency room doctor requested a social work consult. That Horton lost control of the motorcycle and “flung” Martin off was evidence of negligence.

In relation to the negligence elements, the court found telling that law enforcement did not issue Horton a citation in relation to the accident. The court was uncertain, however, when the helmet law was repealed in Michigan. “[T]he real crux” of the motion, in any event, was that Martin did not create a genuine issue of material fact that she had suffered a serious impairment of an important body function. The evidence established, in the court’s estimation, that Martin suffered “substantial” injuries. The evidence also established “with the possible exception of

some knee issues” that Martin had recovered. The court described as unsubstantiated Martin’s claim that she suffered lingering symptoms from her head injury. The court rejected Martin’s claim that her preexisting emotional issues were aggravated by the accident as demonstrated by her suicide attempt; “quite honestly those incidents of bullying I would submit would be separate possible impetus for any emotional damage suffered by this young lady.” Ultimately, the court determined, Martin’s “injuries, while substantial, were in fact reasonably temporary in nature” and her normal life (which included “physical exercise, school attendance, basically living her life”) was “not impaired by this particular incident.” And for substantial injuries, Martin’s injuries were relatively mild; she did not require “a prosthesis” or “long-term therapy” or anything beyond a normal medical procedure to assist her healing. Accordingly, the court dismissed Martin’s complaint.

Martin now appeals.

II. STANDARD OF REVIEW

We review de novo a circuit court’s grant of summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

A motion under MCR 2.116(C)(10) “tests the factual support of a plaintiff’s claim.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh*, 263 Mich App at 621. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West*, 469 Mich at 183. [*Zaher*, 300 Mich App at 139-140.]

When entertaining a summary disposition motion under subrule (C)(10), the court must refrain from making credibility determinations or weighing the evidence. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

III. SERIOUS IMPAIRMENT

Martin created a triable issue of fact that she suffered a serious impairment of an important body function, contrary to the circuit court’s assessment. Pursuant to MCL 500.3135, an injured person may file a negligence action against another involved in a motor vehicle accident “if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(2)(a) further provides:

The issues of whether the injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement. . . .¹

A "serious impairment of body function" is defined by MCL 500.3135(5) as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

The unambiguous language of MCL 500.3135[(5)] provides three prongs that are necessary to establish a "serious impairment of body function": (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living). [*McCormick v Carrier*, 487 Mich 180, 215; 795 NW2d 517 (2010).]

The first two prongs are not really in dispute here. Martin's injuries were objectively manifested. An x-ray proved Martin's broken wrist. Doctors documented the abrasions to Martin's face and knee. The medical reports indicate that Martin suffered a mild TBI that caused partial amnesia, confusion, and potentially headaches. Moreover, Martin reported continuing sensitivity in her mouth and clicking in her jaw.

The impairments were of important body functions. The use of one's arms or wrists is an important body function, *Kroft v Kines*, 154 Mich App 448, 452; 397 NW2d 822 (1986),² as is the use of one's legs and knees, *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). "[M]emory is an important body function." *Guerrero v Smith*, 280 Mich App 647, 664; 761 NW2d 723 (2008). The ability to brush one's teeth and move one's jaw without pain also clearly fits within this category.

¹ Martin has not presented testimony from "a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries" and concedes that as a result, she has not created an automatic question of fact that "there may be a serious neurological injury" pursuant to the second sentence of MCL 500.3135(2)(a)(ii).

² *Kroft* was vacated by *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), but *DiFranco* was subsequently superseded by amendments to MCL 500.3135.

The parties dispute, however, whether Martin's injuries affected her general ability to lead her normal life. The test for determining if an injury affected a person's general ability to lead her normal life is subjective and fact-specific. *McCormick*, 487 Mich at 202. "Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident." *Id.*

There are several important points to note . . . with regard to this comparison. First, the statute merely requires that a person's general ability to lead his or her normal life has been affected, not destroyed. Thus, courts should consider not only whether the impairment has led the person to completely cease a preincident activity or lifestyle element, but also whether, although a person is able to lead his or her preincident normal life, the person's general ability to do so was nonetheless affected.

Second, and relatedly, "general" modifies "ability," not "affect" or "normal life." Thus, the plain language of the statute only requires that some of the person's ability to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected. Thus, while the extent to which a person's general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is, there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected.

Third, and finally, the statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on "the person's general ability to live his or her normal life." To begin with, there is no such requirement in the plain language of the statute. Further, MCL 500.3135(1) provides that the threshold for liability is met "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." While the Legislature required that a "serious disfigurement" be "permanent," it did not impose the same restriction on a "serious impairment of body function." Finally, to the extent that this prong's language reflects a legislative intent to adopt this portion of [*People v Cassidy*, 415 Mich 483; 330 NW2d 22 (1982),] in some measure, *Cassidy* expressly rejected a requirement of permanency to meet the serious impairment threshold. *Cassidy*, 415 Mich at 505-506 (noting that "two broken bones, 18 days of hospitalization, 7 months of wearing casts during which dizzy spells further affected his mobility, and at least a minor residual effect one and one-half years later are sufficiently serious to meet the threshold requirement of serious impairment of body function"). [*McCormick*, 487 Mich 202-203.]

Martin is very athletic and played multiple sports in high school. As a result of her injuries, she missed her freshman year basketball season. She also had difficulty participating in running events during track and field due to continuing knee pain. She testified that she no longer enjoyed running because her knee would give out. Continuing dizzy spells resulted in her falling at a track practice and suffering another concussion. Before the accident, Martin had been a healthy young girl without generalized aches and pains. Immediately after her accident,

Martin had to take prescription pain killers to control her wrist pain and missed a couple weeks of school. Even after her broken wrist healed, Martin experienced twinges of pain during damp weather. Martin further reported difficulties with one of her shoulders, limiting her ability to lift. Martin was a good student both before and after the accident. However, Martin reported partial amnesia from the October 2014 accident through February 2015, and described that she had to relearn the material taught during that time. There was evidence that Martin suffered from migraines before her accident, which she claimed only occurred when she was sick. Following her accident, Martin alleged that she suffered migraines more frequently and unconnected to any illness. She also reported more frequent milder headaches. Moreover, Martin's life before the accident was not easy. She had recently left the home of her longtime foster mother to live with her biological father. Her biological father was verbally and physically abusive, causing Martin emotional trauma. Martin presented evidence that her emotional state declined further after the accident when she was bullied for the speech impediment caused by her mouth injury.

Martin's injuries did not completely destroy her normal life, did not impact every facet of her life, and did not last forever. However, that is not the threshold to establish that a plaintiff's injuries affected her general ability to lead her normal life. Martin presented evidence that, at least for a time, her capacity to live in her normal manner of living was impacted. And that period of time was sufficient to create a genuine issue of material fact.

In *Piccione v Gillette*, ___ Mich App ___, ___ NW2d ___ (Docket No. 342826, issued January 17, 2019), slip op at 1, the three-year-old plaintiff suffered a broken shoulder in a motor vehicle accident, requiring the use of a shoulder sling. The plaintiff was completely healed within three or four months. *Id.* at 2-3. In the meantime, however, the plaintiff

was unable to go to school for approximately two weeks, and when he did return to school he was unable to use the play equipment. Additionally, [his parents] testified that after the accident they had to help him go to the bathroom, including by carrying him to the bathroom. His father testified that before the accident, [the plaintiff] could dress himself, but afterward he could not. There was also testimony that [the plaintiff] needed help going up and down stairs because his balance was negatively affected by his impairment. Further, at times, his ability to sleep without pain was also compromised; his father testified that on occasion [the plaintiff] would wake up complaining about shoulder pain. Finally, the record also reflects that before the accident [the plaintiff] liked to color, but after the accident he did not want to do so. Further, before the accident he rode his bicycle, played soccer, and played with his scooter in the basement, but after he was injured he was unable to do so. His mother testified that, generally, after the accident, [the plaintiff] was "cautious" about physical activities. [*Id.* at 3-4.]

This Court overruled the circuit court and held that this evidence created a question of fact whether the young plaintiff's general ability to lead his normal life was affected by his injury. *Id.* at 4.

In *Neci v Steel*, unpublished per curiam opinion of the Court of Appeals, issued November 13, 2008 (Docket No. 277069), slip op at 1, the 13-year-old plaintiff broke her nondominant arm in a motor vehicle accident. The plaintiff wore a splint and then a fracture

brace, was treated with pain medication, and “was given restrictions on bending, twisting, lifting, and repetitive movements.” *Id.* at 2. The plaintiff also required assistance with “bathing, dressing, grooming, [and] feeding.” *Id.* The plaintiff had difficulty carrying her backpack and missed several days of school. The fracture healed within three months and a six-month follow-up revealed “full range of motion with minimal pain with palpation.” *Id.* This Court affirmed the circuit court’s conclusion that the plaintiff created no genuine issue of material fact regarding her general ability to lead her normal life following the accident. *Id.* at 4. The Supreme Court reversed based on *McCormick*, reinstating the plaintiff’s suit based on the serious impairment of an important body function. *Neci v Steel*, 488 Mich 971; 790 NW2d 828 (2010).

Martin’s wrist was healed within two months and her memory regained after five. Given the Supreme Court’s and this Court’s holdings in *Piccione* and *Neci*, this period was sufficient to create a genuine issue of material fact.

Horton also challenges causation. A plaintiff may succeed by showing that a motor vehicle accident exacerbated a preexisting impairment. See *Benefiel v Auto-Owners Ins Co*, 482 Mich 1087; 759 NW2d 814 (2008). As noted, Martin suffered from headaches and emotional trauma before her accident. However, she presented evidence that both conditions worsened after the accident due to her injuries. She therefore created a genuine issue of material fact in this regard as well. Accordingly, the circuit court erred in summarily dismissing Martin’s lawsuit in this regard.

IV. NEGLIGENCE

Martin also created a genuine issue of material fact regarding Horton’s negligence. “To establish a prima facie case of negligence, a plaintiff must prove that ‘(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant’s breach was a proximate cause of the plaintiff’s damages.’ ” *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012), quoting *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). As noted above, Martin created a genuine issue of material fact that she suffered damages as a result of the accident. The only issue before us is Horton’s duty of care and whether he breached it.

At the time of the subject accident, MCL 257.658(5)³ provided that a motorcycle passenger under the age of 21 was not required to wear a helmet if the driver possessed “security for the first-party medical benefits payable in the event” of an accident of at least \$20,000 per person per occurrence. Martin presented no evidence that Horton did not possess the required security. Accordingly, the circuit court correctly determined that Martin could not prove that Horton bore a duty or a breached a duty in this regard.

However, MCL 257.626b makes it a civil infraction to operate a vehicle “in a careless or negligent manner likely to endanger any person or property.” MCL 257.642(1)(a) provides, “A

³ The statute was adopted by 2012 PA 589 and was effective March 28, 2013. This statutory provision has remained unchanged.

vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the operator has first ascertained that the movement can be made with safety.” Martin created a genuine issue of material fact that Horton violated these statutes. “[E]vidence of violation of a penal statute creates a rebuttable presumption of negligence.” *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 86; 393 NW2d 356 (1986). The relevancy of such evidence “is usually inherently established when the traffic regulation which was violated concerns the manner in which an automobile was operated.” *Id.* at 88 (quotation marks and citation omitted).

The traffic report describes the accident as follows:

Driver 1 was changing lanes and passing vehicle. On the roadway was a [sic] oil substance. Driver 1 lost tracktion [sic] and control. The motorcycle overturned and Driver and passanger [sic] were thrown from the motorcycle. [Crash Report, p 2.]

This narrative creates a genuine issue of material fact that Horton operated the motorcycle in a careless manner and switched lanes when it was not safe to do so. The fact that Martin cannot remember the accident is irrelevant. Summary disposition of Martin’s negligence action was therefore inappropriate.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause
/s/ Colleen A. O’Brien